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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

CHANDLER CLEMONS

PETITIONER

v.

STATE OF MISSISSIPPI

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

REPLY MEMORANDUM

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I. ARGUMENT

A. The Eighth Amendment Does Not Permit An Appellate Court To Save A Sentence Of Death By Reweighing Aggravating And Mitigating Factors Where The Authority For Capital Sentencing Rests Exclusively With the Jury.

Respondent has misstated the petitioner's argument and misconstrued federal law in its brief in opposition to the petition for a writ of certiorari.

1. The Eighth Amendment Prohibits A State From Divorcing The Authority And Power To Sentence From The Responsibility For Weighing And Balancing The Aggravating And Mitigating Circumstances.

Respondent asserts that in Maynard v. Cartwright, ____ U.S. ____, 108 S.Ct. 1853 (1988), this Court held that the finding of the aggravating circumstance "especially heinous, atrocious or cruel" without a proper limiting construction "by the appellate court" constitutes constitutional error. Maynard, however, did not provide that a proper limiting instruction by an appellate court cures the constitutional defect of not giving a proper limiting instruction to the jury. Instead, this Court held that an appellate court's reweighing of aggravating and mitigating circumstances to save a death sentence imposed by a jury which considered an invalid aggravating factor did not satisfy the requirements of the Eighth Amendment. 108 S.Ct. at 1859.

Respondent compounds this error by asserting that the Mississippi Supreme Court's interpretation of Maynard supports the conclusion that an appellate court can cure the constitutional defect of submitting the "especially heinous" aggravating circumstance to the jury without a proper limiting instruction. However, in Pinkney v. State, 538 So.2d 329 (Miss. 1988), the Mississippi Supreme Court held:

> The essence of Maynard is that the "especially heinous, atrocious or cruel" aggravating circumstance is too vague and leaves the jury with unchanneled discretion in imposing the death penalty. In other words, this aggravating circumstance is unconstitutionally vague because it does not offer sufficient guidance to the jury in deciding whether to impose the death penalty. 486 U.S. at ____, 108 S.Ct. at 1859, 100 L.Ed. at 382.
>
> This being so, we must hold that the jury in the instant case considered an invalid aggravating circumstance in deciding whether to impose the death penalty.
>
> * * *
>
> [I]t is sufficient for us to hold that hereafter, capital sentencing juries of this state should and must be specifically instructed about the elements which may satisfy the aggravating circumstance of "especially heinous, atrocious or cruel."

538 So.2d at 355, 357. In its brief in opposition, the respondent acknowledges that the trial court in this case did not give such a limiting instruction to the jury.

The submission of the "especially heinous" aggravating circumstance without a proper limiting instruction to the Clemons' jury was a constitutional infirmity rendering the finding of this aggravating circumstance invalid pursuant to both federal and Mississippi law.

2. The Eighth Amendment Precludes The Supreme Court Of Mississippi From Upholding A Death Sentence On The Basis Of An Unchallenged Aggravating Circumstance.

Respondent's effort to reconcile the Mississippi Supreme Court's attempt to "save" the death penalty in this case by reweighing the mitigating and aggravating factors with the jury's unique and exclusive role under Mississippi law in determining the appropriateness of the death penalty fails on a number of grounds. First, the respondent asserts that an authoritative interpretation of a state statute by the state's highest court "puts these words in that statute as definitely as if it had been amended by the legislature," citing Winters v. New York, 333 U.S. 507, 68 S.Ct. 665 (1948). However, the statute at issue in Winters was held to be vague and indefinite under a First Amendment analysis. In Maynard, this Court rejected a First Amendment approach to analyzing Eighth Amendment vagueness issues. Maynard, 108 S.Ct. at 1857-1858. Moreover, the Mississippi statute that reserves the life or death determination

exclusively to the jury is both unambiguous and unequivocal. Under Mississippi law, the jury must report in writing its unanimous findings after weighing and balancing the aggravating and mitigating circumstances. Without that written report, no person may be lawfully sentenced to death. Miss. Code Ann. § 99-19-101(3)(Supp. 1987). No statute authorizes an appellate court to save a death penalty when an aggravating circumstance is found to be invalid.

The cases cited by the respondent are likewise inapposite. All the Mississippi precedent cited by the respondent pre-date Maynard, which reaffirmed this Court's long-standing mandate that the channelling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement. The federal constitutional infirmity in this case was succinctly stated by the well-reasoned three justice dissent of the Mississippi Supreme Court below:

> Eighth Amendment jurisprudence from Gregg and Godfrey to Cartwright holds that, before the death sentence may lawfully be imposed, the sentencer's discretion must be rationally guided or channelled. The unmistakable effect of the majority's opinion is that this Court is performing the balancing function in Clemons' case. Without doubt, the sentencer need not be the jury, as the Florida experience teaches. But federal law (not to mention common sense), wholly precludes separation of the power to sentence and the responsibility for weighing and balancing the aggravating and mitigating circumstances. If the sentence is to be the product of the balancing process, then that process may only be performed by he who has authority to sentence.
>
> The answer to the majority is that nothing in Mississippi law gives this Court the authority to impose a death sentence, even in the guise of speculating what the jury would have done, under circumstances never presented to it. Federal law precludes our divorcing the balancing power from the sentencing power and arrogating unto ourselves the latter.

State v. Clemons, 535 So.2d 1354, 1371 (Robertson J., Prather J., Hawkins, P.J., dissenting). In Maynard, this Court held that the Oklahoma statute, which contained the exact words of the

Mississippi statute, failed to provide constitutionally adequate guidance for the jury's discretion in considering the death penalty. More importantly, however, this Court found that the state appellate court's "conclusion that on these facts the jury's verdict that the murder was especially heinous, atrocious or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance." 108 S.Ct. at 1859. The effort to "save" the death penalty by the majority opinion of the Mississippi Supreme Court is indistinguishable from that of the Oklahoma Supreme Court in Maynard.

Moreover, the cases cited by the respondent that rely on Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983) for the proposition that a death penalty may be cured on appeal do not address the type of capital sentencing statute enacted in Mississippi. In fact, this Court stated in Zant:

> [W]e do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is valid under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty.

462 U.S. at 890.

In this case, the jury was instructed to weigh the aggravating and mitigating circumstances in considering the appropriateness of the death penalty. The factual balancing required by the Mississippi capital sentencing statute[1] is akin

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[1] Respondent analogizes the Delaware Supreme Court's interpretation of its sentencing statute in Flamer v. State, 490 A.2d 104 (Del. 1984), cert denied, 474 U.S. 865, 106 S.Ct. 185 (1984), to demonstrate that the Mississippi statute is not a "weighing" statute as contemplated by Zant, supra. However, the Delaware sentencing statute is significantly different from the Mississippi sentencing statute. The Delaware statute divides the sentencing stage in two phases (1) a threshold phase when the sentencer determines if an aggravating circumstance exists; and (2) a discretionary phase reached only if the threshold is crossed and at which time the sentencer weighs the aggravating and mitigating circumstances. Id. at 1356. The Mississippi sentencing statute prescribes one phase at the sentencing stage which requires that a jury, and only a jury, weigh and balance aggravating and mitigating circumstances. See Miss. Code Ann. § 99-19-101(3) (Supp. 1987).

to the sentencing statute in Arizona, with regard to which the Ninth Circuit in its first post-Maynard opinion held:

> Post hoc appellate rationalizations for death sentences cannot save improperly channelled determinations by a sentencing court. Not only are appellate courts institutionally ill-equipped to perform the sort of factual balancing called for at the aggravation-mitigation stage of the sentencing proceedings, but, more importantly, a reviewing court has no way to determine how a particular sentencing body would have exercised its discretion had it considered and applied appropriately limited statutory terms. See Caldwell v. Mississippi, 472 U.S. 320, 330, 105 S.Ct. 2633, 2640, 86 L.Ed.2d 231 (1984) ("[state] appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance."); Presnell v. Georgia, 439 U.S. 14, 16-17, 99 S.Ct. 235, 236, 58 L.Ed.2d 207 (1978) (reversing state appellate court affirmance of death sentence based on state court's own finding of an aggravating circumstance that had not been found by the sentencing jury)(per curiam).

Adamson v. Ricketts, 863 F.2d 1011 (9th Cir. 1988), citing Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305 (1983) (the availability of appellate review, including reweighing of aggravating and mitigating circumstances does not make the appellate process part of a single continuing sentencing proceeding).

The conflict between the decisions of the Mississippi Supreme Court, the Ninth Circuit in Adamson and this Court in Maynard and the importance of this constitutional issue to the orderly and proper administration of the death penalty warrants prompt review by this Court. The court below erroneously usurped the exclusive role of the jury in determining the death penalty by holding that it could apply a proper limiting construction of the "especially heinous" aggravating circumstance to save the death penalty in this case. As a consequence, the petitioner has been sentenced to death by the Mississippi Supreme Court -- an institution without the power or authority to make such determination in violation of the petitioner's rights under the

Eighth and Fourteenth Amendments of the United States Constitution.

B. Petitioner Is Not Procedurally Barred From Raising The Prosecutor's Improper Closing Arguments In This Petition.

Respondent's contention that the petitioner never raised the impropriety of the prosecutor's closing argument in the sentencing phase before the state court is factually incorrect. In the appeal before the Mississippi Supreme Court, the petitioner assigned as error number four the following proposition: "The death sentence was imposed under the influence of passion and prejudice against Chandler Clemons." In the petition for rehearing filed before the Mississippi Supreme Court, the petitioner restated this assignment of error more specifically as follows: "The prosecutor's attempt to minimize the accent of black people -- 'Chandler Clemons, it be's that way sometimes' -- in closing argument, was error, just as were the references to theological justifications for the death penalty and the expressions of the prosecuting attorney's personal opinions." Appellant's Petition For Rehearing, Clemons v. State, No. DP 83 Supreme Court of Miss. (emphasis added). The Mississippi Supreme Court denied the petitioner's petition for rehearing without opinion on December 21, 1988. Thus, there can be no question that the issue of the petitioner's closing argument in the sentencing phase was raised in the court below.

The respondent's legal analysis of the "procedural bar" issue is similarly flawed. Quoting Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981), the respondent asserts that this Court has no jurisdiction to hear the petitioner's claim that the prosecutor's closing argument violates Eighth Amendment requirements. In Webb, this Court found that the petitioner did not "claim in her petition for rehearing before the Georgia Supreme Court that the court's failure to reach the federal claim . . . was error." 451 U.S. at 498. In this case, the petitioner specifically raised the federal claim in his petition for

rehearing before the Mississippi Supreme Court. Moreover, this Court indicated in Webb that it has not "insisted on such inflexible specificity" in passing on this jurisdictional issue. 451 U.S. at 493.

Further, the failure to make a contemperaneous objection to the prosecutor's closing argument is not fatal. For example, in Williams v. State, 445 So. 2d 798 (Miss. 1984), cert denied, 469 U.S. 1117, 105 S.Ct. 803, (1985), the Mississippi Supreme Court wrote: "We have long held that unwarranted and improper remarks of a district attorney would warrant reversal where there was a most extreme and intolerable abuse of his privilege, even without defendant attorney's objection. Cartwright v. State, 71 Miss. 82, 14 So. 526 (1893), Powers v. State, 83 Miss. 691, 36 So. 6 (1904), Regan v. State, 81 Miss. 422, 39 So. 1002 (1906), Bufkin v. State, 134 Miss. 116, 98 So. 455 (1924)." 445 So.2d at 810. Indeed, the Mississippi Supreme Court in Williams noted that Miss. Code Ann. § 99-19-105(3)(a) requires the court to review any death sentence to determine whether it has been imposed under the influence of passion, prejudice, or any other arbitrary factor. 445 So. 2d at 811. In capital cases, the Mississippi Supreme Court has exercised the prerogative of relaxing its contemporaneous objection and plain error rules when the interests of justice so require. This Court has noted that the Mississippi Supreme Court has refused "a number of times" to invoke procedural bars in capital cases. Caldwell v. Mississippi, 472 U.S. 320, 328, 105 S.Ct. 2633, 2639 (1985) citing, Williams v. State, 445 So. 2d 798, 810 (1984), Culberson v. State, 379 So. 2d 499, 506 (1979), and Bell v. State, 360 So. 2d 1206 (Miss. 1978), see also Hill v. Thigpen, 667 F.Supp. 314, 319-322 (N.D. Miss. 1987).

By raising the "passion and prejudice" argument in the appeal and specifically addressing the prosecutor's closing argument in the petition for rehearing, the petitioner provided the Mississippi Supreme Court a fair opportunity to address the constitutional question that the petitioner presents in this

writ. The petitioner has exhausted the remedies available in the Mississippi courts before making this petition as required by 28 U.S.C. § 1257(3).

CONCLUSION

For these reasons, the petitioner respectfully requests this Court to grant the petitioner's petition for certiorari.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition For A Writ Of Certiorari, Reply Memorandum was served upon Marvin L. White, Jr., Assistant Attorney General, P.O. Box 220, Jackson, Mississippi 39205 by regular U.S. mail, postage prepaid on this 30th day of May, 1989.